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Sterling Savings Bank, Successor in Interest by Merger to Sonoma National Bank

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8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

10 In Re: Case No. 09-58098 ASW 11
11 TV-32 DIGITAL VENTURES, INC., a Chapter 11
12 California corporation, R.S. No. RKS/002
13 Debtor. Date: March 28, 2011
Time: 2:00 p.m.
Location: 280 S. 1st Street, San Jose, CA
Courtroom: 3020, 3rd Floor
The Hon. Arthur S. Weissbrodt

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15 **STERLING SAVINGS BANK'S MOTION FOR RELIEF FROM AUTOMATIC STAY AND**
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SAME

16 COMES NOW, Sterling Savings Bank, as successor in interest by merger to Sonoma
17 National Bank ("Sterling") and, moves this Court for an order granting relief from stay pursuant to
18 11 U.S.C. § 362(d)(2), as follows:

19

20 **I. INTRODUCTION**

21 Sterling holds a first deed of trust with assignment of rents on the Debtor's real property
22 located at **1010 Corporation Way, Palo Alto, California 94303; A.P.N. 116-01-025** (the
23 "Property.") Other than the five (5) adequate protection payments made since this Court's order for
24 same on October 8, 2010, the Debtor has not made a payment to Sterling since December of 2008.
25 The Debtor filed for bankruptcy on the eve of Sterling's foreclosure, in September of 2009, and has
26 strung Sterling along and deprived it of its collateral for a year and a half since then. The Debtor has
27 no equity at all in the Property. The Debtor also has not demonstrated, and cannot demonstrate, that
any reasonable prospect exists for reorganization. As such, Sterling is entitled to relief from the

1 automatic stay, and urges this Court to grant it relief from the automatic stay so that it can preserve
2 and protect its rights under its Deed of Trust.

II. FACTUAL BACKGROUND

Sterling is the holder of a Promissory Note payable by the Debtor herein in the amount of \$2,023,750.00 (the "Promissory Note.") (*See Declaration of Lori Crechriou, ¶ 2.*) The Promissory Note is secured by a First Deed of Trust and Assignment of Rents against the Debtors' real property located at **1010 Corporation Way, Palo Alto, California 94303**. (*See Declaration of Lori Crechriou, ¶ 2.*) The Property is a commercial building, which generates rental income that is subject to Sterling's Assignment of Rents. (*See Declaration of Lori Crechriou, ¶ 3.*) Other than the five (5) adequate protection payments ordered by this Court on October 8, 2010, the Debtor has failed to make payments on the Promissory Note from and after December of 2008. (*See Declaration of Lori Crechriou, ¶ 4.*) Sterling recorded its Notice of Trustee's Sale on August 28, 2009, therein setting the trustee's sale of the Property for September 24, 2009. (*See Declaration of Lori Crechriou, ¶ 4.*) The Debtor filed the instant bankruptcy proceeding on September 23, 2009. Since the inception of the bankruptcy, the Debtor has failed to generate sufficient revenues to service any of the debt secured by the Property, failed to pay taxes relating to the Property, and failed to actively market the Property for sale.

18 As is set forth in the accompanying Declaration of Lori Crechriou (*at ¶5*), approximately
19 \$2,367,561.52 is due and owing to Sterling under the Promissory Note, as follows:

20	Principal Balance:	\$ 2,003,706.43
21	Interest to 03/28/11:	\$ 293,286.88
22	Late Charges:	\$ 17,196.40
23	Forced Place Insurance (Hazard and Flood)	\$ 18,182.80
24	Foreclosure Costs	\$ 14,917.67
25	Appraisal Fees	\$ 12,925.00
26	Environmental Reports	\$ 1,391.50
27	Site Visits	\$ 1,325.00

1 Legal Fees \$ 62,129.84

2 Post-Petition Payments \$ (57,500.00)

3 **TOTAL AMOUNT DUE: \$ 2,367,561.52**

4 A second deed of trust encumbering the Property secures an additional \$1,641,210 payable
5 to the Small Business Administration. (*See Request for Judicial Notice, Ex. A.*) Delinquent
6 property taxes for the Property totaling approximately \$107,022.87 are also due and payable. (*See*
7 *Declaration of Lori Crechriou, ¶ 6.*) Thus, more than \$4,115,794.39 of secured debt encumbers the
8 Property. In December of 2009, Sterling obtained an appraisal of the Property valuing same at
9 \$4,300,000. (*See Declaration of Lori Crechriou, ¶ 7.*) In June of 2010, Sterling obtained an
10 appraisal of the Property valuing same at \$2,800,000. (*See Declaration of Lori Crechriou, ¶ 8.*)
11 Using either of these values, the Debtor has no equity in the Property, as even if the older appraisal
12 were still valid, once closing costs (2% of sales price) and commissions (6% of sales price) are
13 factored in, no equity remains. (*See Declaration of Lori Crechriou, ¶ 9.*)

14 The Debtor has failed to get a Disclosure Statement approved, and no viable plan of
15 reorganization exists.

16 As it is evident from the foregoing that the Debtor has no equity in the Property, and
17 because no evidence exists that reorganization is a possibility, Sterling seeks an order granting relief
18 from the automatic stay to assert its rights under the its First Deed of Trust on the Property.

19 **II. LEGAL ARGUMENT AND AUTHORITIES**

20 **A. STERLING IS ENTITLED TO RELIEF FROM THE AUTOMATIC STAY
21 BECAUSE THE DEBTOR HAS NO EQUITY IN THE PROPERTY AND CANNOT
22 DEMONSTRATE THAT THE PROPERTY IS NECESSARY FOR AN EFFECTIVE
23 REORGANIZATION.**

24 11 U.S.C. § 362(d) provides, in pertinent part, as follows:

25 (d) On request of a party in interest and after notice and a hearing, the court shall grant relief
26 from the stay provided under subsection (a) of this section, such as by terminating,
27 annulling, modifying, or conditioning such stay-

28 (2) with respect to a stay of an act against property under subsection (a) of this
section, if--

29 (A) the debtor does not have an equity in such property; and

30 (B) such property is not necessary to an effective reorganization.

1 In this case, both elements of Section 362(d)(2) are met.

2 **1. The Debtors Have No Equity in the Property.**

3 A debtor's equity in real property is the difference between the property value and the total
4 amount of liens against the property. (*Stewart v. Gurley* 745 F.2d 1194, 1195-96 (9th Cir. 1984).)
5 In this case, Sterling's December, 2009 appraisal sets the value of the Property at \$4,300,000.
6 Sterling's June, 2010 appraisal sets the value at \$2,800,000. The secured claims against the
7 Property exceed \$4,115,794.39. Thus, using either appraisal the Debtor has no equity in the
8 Property located at **1010 Corporation Way, Palo Alto, California 94303**. Indeed, even if the
9 \$4,300,000 appraise were still valid, which is doubtful given the decline in the economy and the
10 current state of the commercial real estate market, sales commissions and closing costs would easily
11 consume any remaining equity above the \$4,115,794.39 in secured liens.

12 Accordingly, relief from stay is proper unless the Debtor can establish that the Property
13 is necessary to an effective reorganization.

14 **2. The Property Is Not Necessary for Effective Reorganization**

15 Since the Debtor does not have any equity in the Property, the dispositive issue is whether
16 the Property is necessary for an effective reorganization. (11 U.S.C. § 362(d)(2)(B).) While a relief
17 from stay hearing should not be converted into a plan confirmation hearing, a hearing to determine
18 the confirmability of a debtor's plan is not necessary for the court to address the "effective
19 reorganization" component of 11 U.S.C. § 362(d)(2)(B). (*In re Sun Valley Newspapers, Inc.* 171
20 B.R. 71, 74 (9th Cir. BAP 1994).) The "effective reorganization" component in a motion for relief
21 from stay requires a showing by the debtor that a proposed plan is not patently unconfirmable and
22 has a realistic chance of being confirmed. (*Id.* at p. 75.) The burden of proof on a debtor in this
23 regard is to "offer sufficient evidence to indicate that a successful reorganization within a
24 reasonable time is 'plausible.'" (*Ibid.*) If the evidence indicates that a successful reorganization
25 within a reasonable time is impossible, the court must grant relief from stay. (*Ibid.*) It is not
26 enough for the Debtor to simply argue that the automatic stay should continue because it needs the
27 property in order to propose a reorganization. (*La Jolla Mortgage Fun v. Rancho El Cajon Assoc.*,
28 18 B.R. 283, 291 (Bankr. S.D. Cal. 1982); *see also, United Savings Assoc. of Texas v. Timbers of*

Inwood Forest Assoc., Ltd. 484 U.S. 365, 375-76.) “If all the debtor can offer at this time is high hopes without any financial prospects on the horizon to warrant a conclusion that a reorganization in the near future is likely, it cannot be said that the property is necessary to an ‘effective’ reorganization.” (*Ibid.*) The lack of any realistic prospect for reorganization requires relief under 11 U.S.C. 363(d)(2). (*United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.* 484 U.S. 365, 376.)

In this case, by the time of this hearing, the Debtor will have been in bankruptcy for a year and a half. Although the Debtor proposed a plan in January of 2010, it is no closer to having a plan confirmed today than a year ago. Indeed, in the Pre-Hearing Statement filed by the Debtor in connection with the most recent hearing on the matter on March 9, 2011, the Debtor all but acknowledged that it had no basis to further promote its Disclosure Statement or Plan. (*See Request for Judicial Notice, Ex. B and C.*) The Court thereafter took the hearing on the Debtor's Disclosure Statement off calendar. The inevitable conclusion to be drawn from the totality of the facts of this case is that no reasonable prospect exists for reorganization of this Debtor in the near future. At the most, all the Debtor can offer is "high hopes," without any realistic financial prospects on the horizon to warrant a conclusion that a reorganization is likely. As such, it cannot be said that the Property, **1010 Corporation Way, Palo Alto, California 94303**, is necessary to an effective reorganization. (*La Jolla Mortgage Fun v. Rancho El Cajon Assoc.*, 18 B.R. 283, 291 (Bankr. S.D. Cal. 1982); *see also, United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.* 484 U.S. 365, 375-76.) Thus, no basis exists to continue to require Sterling to wait, as the market declines, to enforce its rights under its First Deed of Trust. The evidence indicates that a successful reorganization within a reasonable time is impossible. Accordingly, the Court must grant Sterling relief from stay.

III. CONCLUSION

25 For all of the foregoing reasons, Sterling urges this Court to issue an order granting relief
26 from the automatic stay to enable it to assert its rights under its deed of trust secured by the Debtor's
27 property located at **1010 Corporation Way, Palo Alto, California 94303**, as well as all state court
28 remedies necessary to secure possession of the Property, including the serving of notices and

unlawful detainer proceedings. Sterling further requests a waiver of the 14-day stay imposed by Bankruptcy Rule 4001(a)(3).

**ABBEY, WEITZENBERG,
WARREN & EMERY**

By: /s/ Rachel K. Stevenson

Rachel K. Stevenson

Attorneys for Sterling Savings Bank